15

MAY 1 1944
CHARLES ELMORE CROPLEY
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1944

OTTO GRESHAM,
Appellant,

v.

THE INDIANA BAR ASSOCIATION,
Appellee.

No. 950

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

OTTO GRESHAM,
Attorney.

[illegible]

INDEX

Page

1. The Act of June 19, 1934, on the rule making power.. 2
2. The grant of the legislative powers..... 3
3. The grant of the judicial power..... 3
4. Suit brought July 16, 1943, in the U. S. District Court for the Southern District of Indiana for a mandatory injunction and to test the constitutionality of the Act of June 19, 1934..... 4
5. Perhaps the suit should have been brought in this Court. It can be considered an original suit..... 5
6. The suit involves the power of this Court to preserve the judicial system..... 5
7. The origin of the British Government as defined and described by McCauley. British Empire based on compromise. American Republic based on logic. Compromise no basis for a permanent government 13–16
8. Samuel Chase in 1796, in *Ware v. Hilton*, 3 Dallas 169, defines the difference..... 14
9. Thomas Jefferson opposes Chase's construction. Writes the Resolutions of '98..... 17
10. Jefferson did not stop Chase but he led his followers to Appomattox..... 17
11. Washington declines the crown which the American soldiers, the Tories and British generals urged him to assume..... 18

Page

12. Sir Guy Carleton, the commander-in-chief, warns Washington at their last interview that he could not make a go of the republic and that a mob was organized in New York to loot the city as soon as Governor Clinton took possession 44–45

13. After the failure of the republic under the Articles of Confederation, Washington came back to prove to Sir Guy Carleton that he could make a go of the republic 44

14. Washington was the author of our judicial system. He it was who wanted an independent judge 25

15. Citizenship 18
Washington the first to declare himself a citizen as distinguished from a subject. Failure to define 18
But because of no definition of citizenship no reason to deny him his rights and privileges 17
Supplemented by the 14th Amendment 18

16. Difficult as was the task that was imposed on the lawyers of the time is no reason why their successors and the members of this Court should refuse to hear the boys in the trenches when the lawyers and this Court undertake to inaugurate a new system of government, as this Court says in *Sabbath v. Wilson*, 312 U. S. 1 19

17. Washington's soldiers were not for the government of the Continental Congress. In organizing the Society of the Cincinnati, the oldest patriotic society in the country, and the model for all the soldiers' organizations on May 10, 1783, it declared its purpose to preserve the principles of

Page

the American Revolution. The Military Order of the Loyal Legion, organized the day Mr. Lincoln was shot, was able to go farther than the Order of the Cincinnati in support of the Government of the United States 19

18. This Court was not altogether fortunate in attempting to decide the question of citizenship under our then compromised system of government. Correctly decided, as it did in *Dred Scott v. Stanford*, 19 Howard 393, the question of Scott's citizenship, it was a mistake at that time to enter on a constitutional or economical question 24

But there can be no question about the power and duty of this Court now to settle a question of its power under an act of Congress, which involves the functions of the Congress and the executive as well as the very existence of the Court itself..24–25

19. The most important of the Bills of Rights is the division of powers of our government into the three departments. Indeed it was agreed that, with this division, no other Bill of Rights was necessary 24

20. Let not this Court take part as a subordinate in the assumption of the legislative power 25

21. The United States as a popular is the most powerful of all governments 26

22. Similiarity of the Constitutions of the United States of America and the Confederate States of America 27–33

Page

23. Logic is more powerful in government than the compromises of the statesmen and the business men 33–35

24. Abolition 36–40

Mistakes of compromise in government 40–41

25. Washington back with the army. The period between the surrender of Cornwallis, October 19, 1781, and the signing of the Preliminary Treaty of Peace, November 30, 1782, is the most important but the least noticed by the writers in our history 41–45

26. Jay makes the Treaty of Peace with Great Britain 41, 45, 46

27. The career of Alvin P. Hovey, who made for this Court the case of *Ex parte Milligan* 46–52

28. His war service. Meets U. S. Grant and John A. Rawlins, General Grant's Chief of Staff, the most capable lawyer of his time—but not the most considerate—he was chief factor in the adoption of the 14th and 15th Amendments. Hovey becomes one of Grant and Rawlins' chief confidential advisers. He prevents the first meeting between Lee and Grant because Grant wanted to be too generous. And then General Grant at his last meeting with General Lee turns down Rawlins and President Lincoln and Johnson and Secretary Stanton and promises complete amnesty and puts it over. In command of Military District of Indiana, Hovey was the sole author of the Military Commission. It was in part directed at

Page

General Sherman as well as at Lampdon P. Milligan. After the release by this Court of Lampton P. Milligan, Milligan sues General Hovey and the members of the Military Commission in the Huntington County (Indiana) Common Pleas Court in trespass. The Government removed the case to the Circuit Court for the District of Indiana and retains General Benjamin Harrison to defend, while Senator Thomas A. Hendricks prosecutes. Circuit Judge Thomas Drummond presides and all but instructs the jury to find the defendants not guilty. But the jury, made up of war Democrats and Republicans, find the defendants guilty and assess their damages at $5.00 under an indemnity statute which allowed such damages. There is a book of 600 pages about the Milligan case but there is no mention of this jury trial 50–61

29. Thomas A. Hendricks and Sherman's "Bummers".. 66

30. Sure we recur to *Ex parte Milligan*. This Constitution of the United States is a law for rules and people *equally in War and Peace*..... 67

31. South Carolina's logic backs down New York and New England commercialism and Secretary of State Seward to be and the President-Elect Abraham Lincoln with the 13th Amendment to make slavery express and irrevicable while Alvin W. Hovey helps in the Indiana Legislature of 1861 to lay the ground for the men and the military courts that would put into the Constitution the

Page

logic to which South Carolina appealed December 20, 1860 50

32. There was a great debate on Military Rule both south and north of the river. Alexander H. Stephenson led against it in the Confederate States of America while Lyman Trumbull, the chairman of the Judiciary Committee of the United States Senate led in the United States Senate aided by Thomas A. Hendricks on the listings that the constitutional way was the best way to prosecute the war 33

33. Act of the Confederate Congress authorizing the Confederate President to declare martial law 28

34. Mr. Lincoln as president assumes that power 28

35. The Merriman Case 29

35. Trumbull by a resolution questions that power and calls on Secretary of State Seward for a list of his prisoners 29

36. Thaddeus Stevens introduced a resolution to indemnify the president and all in authority for all acts done in suppressing the rebellion 32

37. Both of these resolutions became laws. The indemnity was illogical and is unconstitutional because Congress cannot dispense with the Bill of Rights 33

TABLE OF CASES

	Page
Ware & Hilton, 3 Dallas 198	48
Vanstophost v. Maryland, 2 Dallas 401	20-27
Chissholm v. Georgia, 2 Dallas 419	20
Georgia v. Brailsford, 2 Dallas 402	20
Calder v. Bull, 3 Dallas 386	20
Prigg v. Pennsylvania, 16 Peters 536	23-49
Dred Scott v. Stanford, 19 Howard 393	23-49
Bridges v. California, 314 U. S. 252	13
Sibback v. Wilson Co., 312 U. S. 252	20-23
The Federalist, LXXIV, p. 467	17
Hoge v. Industrial Union, 307 U. S. 496	21-22
Congressional Globe 1866, Part 4, p. 2893	23
Gibbon v. Ogden, 4 Wheat	25
Ex parte Garland, 4 Wallace 333	21
Martin v. Hunter's Lessee, 1 Whalen 304	22

IN THE

SUPREME COURT OF THE UNITED STATES

JANUARY TERM, 1944

OTTO GRESHAM, *Appellant*, v. THE INDIANA BAR ASSOCIATION, *Appellee*.	No.....

PETITION FOR WRIT OF CERTIORARI

PETITION FOR WRIT OF CERTIORARI REQUIRING THE DISTRICT COURT OF THE UNITED STATES TO CERTIFY TO THE SUPREME COURT FOR ITS RECORD AND THE DETERMINATION OF THE CAUSE OF OTTO GRESHAM VS. THE INDIANA STATE BAR ASSOCIATION, OR IN THE ALTERNATIVE TO TREAT HIS PETITION AS AN ORIGINAL SUIT.

Your petitioner, Otto Gresham, respectfully shows to this Honorable Court,

That he is a citizen of the United States, born in the State of Indiana and a citizen of that State; that he is a member of the bar of this Honorable Court, of the bar of

the District Court for the Southern District of Indiana and of the Supreme Court of Indiana. He is also a member of the bar of the Supreme Court of Illinois and of the Chicago Bar Association.

That the questions involved in the above entitled cause are questions involving more than "a departure in policy" from the original division of powers of our government under the Constitution and Amendments down to and including the Fourteenth; that the Act of June 19, 1934, is more than a departure in policy from our Constitutional system. It is a destruction of that system, itself, and involves not only the powers and duties of this Court but involves the duty of your petitioner as a citizen of the United States and as a citizen of the United States admitted to practice herein and as an officer of this Honorable Court in his duty under his oath to support the Constitution and laws made in pursuance thereof.

That the Act of June 19, 1934, involves not only the rights, privileges and immunities of your petitioner but the rights, privileges and immunities of all other citizens of the United States and especially of all citizens admitted to practice herein.

But more important than all it involves the power and duty of this court to preserve its judicial power.

The Act of June 19, 1934, and the constitutional provisions governing this Court and Congress follow:

> "Be it enacted * * * That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings and motions, and the practice and procedure in civil

actions at law. Said rules shall neither abridge, enlarge, nor modify the substantive rights of any litigant. They shall take effect six months after their promulgation, and thereafter all laws in conflict therewith shall be of no further force or effect.

"Sec. 2.—The Court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both; Provided, however, That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

(Act of June 19, 1934, c. 651. Secs. 1, 2 (48 Stat. 1084), U. S. C. Title 28, Secs. 723b, 725c.)

The first section prohibits the court from doing what the second authorizes it to do and under which it acted.

If the first section did not prohibit the second section from doing what the second authorized, the Constitution does.

"All legislative power hereby granted shall be vested in a Congress of the United States."

Sec. 1 of Article I.

"All judicial power of the United States shall be vested in one Supreme Court and such inferior courts as the Congress may from time to time ordain and establish."

Sec. 1, Article 3.

This suit was brought July 15, 1943, by the petitioner, the plaintiff below, as a citizen of the United States and of the State of Indiana residing therein, in the District Court of the United States for the Southern District of Indiana and, as an officer of this Court, against the Indiana State Bar Association for a mandatory injunction requiring it to accord your petitioner a hearing as to the constitutionality of the Act of June 19, 1934, at its annual meeting to be held on the 17th day of July, 1943. The Indiana Bar Association is a voluntary association formed "to cultivate the science of jurisprudence to secure the efficient administration of justice and reform in the law." * * *

On the 16th of July, on an application for a restraining order, Judge Baltzell, the District Judge, disqualified himself. On December 3, 1943, Circuit Judge Evan A. Evans assumed jurisdiction and, after oral argument, dismissed the complaint with an opinion which is a part hereof as Exhibit "A".

On December 9, 1943, there was filed a petition for a rehearing which was overruled April 19, 1944, by Judge Evans.

Perhaps this case should have been brought in this Court as an original suit by petition, but inasmuch as it called on the subordinate courts as well as members of the bar as to the practicability of the proposed rules "on the change of policy" and inasmuch as the constitutionality of the departure from our constitutional system had been made but not decided by this Court, it was thought proper to call on the subordinate courts as to the constitutionality of the Act of June 19, 1934. The action of this Court and that of the Advisory Committee and of the Congress under the Act of June 19, 1934, contemplates coming to this

Court whether it be an original or appellate duty. Very properly this Court can consider this petition as the beginning of an original suit.

However this may be the application to the District Court and its reluctance to enter a final order because of want of jurisdiction makes it imperative that this Court decide the constitutionality of the Act of June 19, 1934.

We quote from the complaint (transcript, page 13):

> On the 20th of December, 1937, the Chief Justice transmitted the Rules as amended to the Attorney General, who, in turn, on January 3rd, transmitted them to Congress. The House referred them to its Judiciary Committee composed of twenty-five of the two hundred eminent lawyers who made up its membership.
>
> Instead of referring back to the Supreme Court the question of amending or construing the rules, as we shall see, the Judiciary Committee and the Advisory Committee assumed that power.
>
> To the Honorable Holton W. Summers, the genial and scholarly Chairman of the Judiciary Committee, we did not wait for an invitation to appear but made our protest in writing that much of what the Supreme Court was doing was substantive law or legislation and should be done by the Congress; that Congress could not delegate and the Supreme Court could not take any of the legislative power.
>
> On the 1st, 2nd and 3rd of March, 1938, Chairman Summers had a hearing of the Judiciary Committee of the House.

THE CONSTITUTIONAL QUESTION

The first question raised was the constitutionality of Rule 17, which Dean Charles E. Clark of the

Yale Law School and the Secretary of the Advisory Committee said was unconstitutional if it meant what it said,—in that it reversed the Coronado case, in which the Supreme Court had reversed the District Court for the Western District of Arkansas in which that court and the Court of Appeals for the Sixth Circuit had upheld a judgment for $700,000.00, triple damages against the United Mine Workers of America. It is manifest from the record of the case, as so much of it appears in 259 U. S. 344, that the judgment on its merits ought to have been upheld. Its reversal was due, in part, to the inability to get service on a responsible party,—that is, an executive officer, and the want of power to hold a parent or national organization through a local or state organization—powers that the court could not assume through any system of rules. Only the legislative power of Congress can remedy these defects in our industrial system.

Representatives of the Labor organization, Judge Joseph A. Padway of the A. F. of L. and Merle D. Vincent, Counsel for the International Ladies Garment Workers Union, and Lee Pressman, Counsel for the C. I. O., claimed the Rule 17 supplemented by Rule 4 (d) 3 providing for service by serving any agent did overrule the Coronado case.

EX-ATTORNEY GENERAL MITCHELL, CHAIRMAN OF THE ADVISORY COMMITTEE, and MAJOR EDGAR B. TALMAN SAID IN 1938 THAT UNDER THE ACT OF JUNE 19, 1934, CONGRESS COULD CHANGE ANY OR ALL RULES THE SUPREME COURT MIGHT MAKE UNDER THAT ACT.

William D. Mitchell, ex-Attorney General of the United States and Chairman of the Judiciary Committee, and Major Edgar B. Talman, the Secretary of the Advisory Committee and Editor of the

American Law Journal, contended that Rule 17 did not overrule the Coronado case and that the Advisory Committee and the Supreme Court were very careful not to make any change in the existing law. These two gentlemen further urged on the Judiciary Committee of the House: That Congress could change any of the rules; that had Messrs. Vincent and Pressman brought to the attention of the Supreme Court their views as to how service could be made on their clients, the changes would have been made before the rules left the court.

> Pages 15 to 26; 162 to 163 and Major Talman pages 66 to 78; 89 to 108 of the Hearings Before the Committee of the Judiciary, House of Representatives, Seventy-fifth Congress, Third Session, March 1, 2, 3, and 4, 1938, Serial 19.

> "Coming at this time, however, said the Attorney General, the suggestions are not so easy to be dealt with. The fundamental principle back of the new system is to have court-made rules and not legislative rules, and the moment the legislative body commences to alter the rules promulgated by the court, the whole system is thrown into discord and we have a mongrel system * * *."

Instead of uniting with the labor lawyers and the Chairman of the Judiciary Committee in making an interpretation of Rule 4(d)3, had Mr. Ed-Attorney General done what he now claims should have been done; referred the objections to Rule 17 and 4(d)3 and 65e back to the Supreme Court, it would have developed that Congress would have been compelled to do what it has subsequently attempted to do by the Smith-Connally Act and that the Act of June 19, 1934, is unconstitutional.

The Supreme Court having promulgated a rule, neither the ex-Attorney General nor the Advisory Committee and Congress combined can cancel or change it.

Notwithstanding the arguments of Messrs. Mitchell and Talman, I continued to press on the Judiciary Committee of the House that Congress should do the legislating; that a code as to how jurisdiction should be acquired over the great labor organizations such as the Mine Workers should be formulated and enacted by Congress.

This work culminated or ended on the 17th day of May, 1938, when I made my request and challenges in person to the Honorable Holton W. Summers, the Chairman of the Judiciary Committee of the House of Representatives.

As considerately and as courteously as I could, I protested to the worthy chairman the want of power on the part of Congress and the want of capacity on the part of the Court to take the power to make the rules that should be made to enable the government of the United States to control the labor interests of the country,—and a year later, May 16, as a witness before the full committee, as will appear by referring to the record, made good that insistence and protest.

But, on the 15th of June, 1938, at the instance of the aforesaid labor lawyers, the Judiciary Committee by and through Chairman Summers, after acknowledging the aid rendered by the individual members of the Bar making "suggestions for the perfecting of the work, *not only as to substance* but as to form of and method of expression," made the final exposition of the powers of the Supreme Court and Congress with reference to the rule making power—in which the distinguished chairman claims Congress is supreme.

This last proposition we most emphatically deny. But, having placed the power of making the rules in the Supreme Court because, as Congressman Cellar of the Judiciary Committee said, of the superior knowledge of the judges as to how the rules should be drawn, I claim only the Court can change them after once promulgated.

As to this Chairman Summers says, in this report of June 13, 1938, which the House approved,

> "It should be emphasized that any and all of the rules of procedure are subject to the modification or repeal by Congress. Furthermore, it is the opinion of the Committee that amendments made by the Supreme Court to the United rules must be submitted to Congress in accordance with the method prescribed for submitting the original rules, i. e., they must be submitted to Congress by the Attorney General at the beginning of a regular session and will not go in effect until after the close of the session."

An apt illustration of this assumption of power is continued in this report of Chairman Summers of June 15, 1938. He says:

> "The Committee on the Judiciary suggested that the quoted phraseology of these two rules 4(d)3 and 65(e) be considered at a conference between the representatives of the three mentioned labor organizations and of the Supreme Court Advisory Committee, so that any source of possible difficulty arising from the language might be avoided. This conference was held and it was agreed that all doubts as to the meaning of the language used, raised by the representatives of the labor organizations, would be removed

by adding to the notes to rule 4(d)3 and to rule 65(e) of the Notes of the Rules of Civil Procedure prepared under the direction of the Advisory Committee the following:

To the Note 4(d) (3):

"This enumerates the officers and agents of a corporation or of a partnership or other incorporated association upon whom service of process must be made, and permits service of process *only* upon the officers, managing or general agents authorized by appointment or by law, of the corporation, partnership or unincorporated association against which the action is brought."

To the Note to Rule 65(e):

"The words relating to temporary restraining orders and preliminary injunctions in actions of employers and employee are words of description and not of limitation."

"The Committee on the Judiciary has considered the additional notes and believe that they state the correct interpolation and construction of the respective rules."

The Conelly Harniss Bill or Act demonstrates the utter futility of the Rules of Civil Procedure and the necessity for a code of laws whereby service may be had on the great unincorporated associations which are now, as procedure stands, more powerful than government.

This can be remedied only by a code of laws enacted by Congress. Our objection that Congress could not exercise the judicial power, however it might dispose of its legislative power, was disposed by the distinguished Chairman of the Judiciary Committee and the House of Representatives:

> "The principle underlying the rules of court is the organic one of an equitable division of power between the legislative and judicial departments of government. It is the very spirit of the Constitution."

Most respectfully and considerately do we deny that the apportionment of the legislative and judicial power is "the spirit of the Constitution." But it does logically lead to the doctrine now asserted that we should be deprived of our right—it is more than a privilege or liberty—to question this consolidation of power,—and this, too, whether the Congress or the Court called on us for our views as to this proposed consolidation of power.

Our protest brought a prompt response not only in Congress but in the American and Indiana Bar Associations themselves.

So, on July 29, 1958, at Cleveland, at the Annual Meeting of the American Bar Association, Frank Hogan, the president to be, said:

"Our bills-of-right—our first ten amendments—constitute the most glorious two short pages in the English language."

Following up his declaration about the virtue of our Bill of Rights, after descanting on how these bills-of-right were flouted not only by large groups of people, but the Congress itself and even by lawyer members of the convention, Mr. Hogan was logical and proposed that there ought to be created by this Association a Committee on the Bill of Rights to intervene, if necessary, anywhere where a citizen was being oppressed, and especially to deal with the state and local bar associations for any omissions on their part in failing to live up to Bill of Rights; and he wound up by advising that a Committee on Bill of Rights be appointed who would protect even the humblest of our citizens.

Even before Mr. Hogan was inaugurated as president and before the Association adjourned, that 1938 Convention provided for our Bill of Rights Committee.

On the 17th day of September, 1938, when I proposed to bring to the attention of the Indiana Bar Association the methods by which Chairman Summers of the Judiciary Committee of the House had put over the Rules, I was arbitrarily deprived of the floor. At the Mid-Winter Meeting of the Indiana Bar Association of 1943, I was declared out of order when I proposed bringing to its attention that the resolution before the Bill of Rights Committee of the American Bar Association was undisposed of. And I am informed that I am not to be permitted, anywhere before a Bar Association, to discuss the validity of the Rules of Civil Procedure for the District Courts of the United States.

The action of William D. Mitchell, Chairman of the Advisory Committee of the Supreme Court in refusing me copies of the draft of the rules as made by the Supreme Court as appears by Exhibit B, is conclusive of the purpose and power of a faction of the American and Indiana Bar Associations to deprive me of the freedom of speech, which of course is a very small matter, but what is of paramount importance is a change of the fundamental structure of our government and society.

APPORTIONMENT OF THE LEGISLATIVE AND JUDICIAL POWER

This power of apportionment of the legislative and judicial power between Congress and the Supreme Court, we questioned in a resolution presented to the American Bar Association, where a hearing was accorded me by the Resolutions Committee of the Association of which the Honorable Holton W. Summers was Chairman. There was

opposition but that Committee referred it to the recently created Bill of Rights Committee of the American Bar Association. This Committee was created, as we have shown, at the instance of President Hogan of the American Bar Association, who said "the rights of our humble citizens were being flouted by some of our eminent lawyers and subordinate bar associations.

At President Hogan's insistance, the newly created Bill of Rights Committee intervened in the Hague case. While the opinion of Justice Stone, now Chief Justice, shows that the Bill of Rights Committee, although composed of lawyers of high standing, didn't understand the Hague case, Justice Stone's opinion revealed what I have contended, —and contend here—that the first section of the Fourteenth Amendment is self executing. My resolution brought about a change in the Membership Committee of the Bill of Rights of the American Bar Association."

Exhibit "B." shows the necessity of this court taking jurisdiction of this suit on petition.

ENGLISH COMMON LAW

Most properly does this Court—and perhaps for the first time in *Bridges v. California*, 314 U. S. 264, declare that the American Republic did not originate in the English common law.

In Volume 3, page 1276, Macauley describes that system:

> "This resolution (1688) declaring the throne vacant and vesting the succession in William and Mary) has been many times subjected to criticism as minute as was ever applied to any sentence written by man; and perhaps there never was a sentence

> written by man which would bear criticism less, * * * It is idle, however, to examine these memorable words as we should examine a chapter of Aristotle or Hobbs. Such words are to be considered, not as words, but as deeds. If they effect that which they are intended to effect, they are rational though they may be contradictory. If they fail of attaining their end, they are absurd. In fact one beauty of the resolution was its inconsistency. Logic admits of no compromise. The essence of politics is compromise. It is therefore not strange that some of the most important and most useful political instruments in the world should be among the most illogical."

Samuel Chase, as the spokesman for this Court, with George Washington and the people of the United States behind him, in *Ware v. Hilton*, 3 Dallas 169, in 1796, wielded more power than Lord Mansfield as the head of the Court of Kings Bench with George the III as his support.

Let him tell how he got it, 3 Dallas 233:

> "It is worthy of remembrance, that delegates and representatives were elected by the people of the several counties and corporations of Virginia, to meet in general convention, for the purpose of framing a new government by the authority of the people only; and that the said convention met on the 6th of May, and continued in session until the 5th of July, 1776; and in virtue of their delegated power, established a constitution, or form of government, to regulate and determine by whom, and in what manner, the authority of the people of Virginia was thereafter to be executed. As the people of that country were the genuine source and fountain of all power that could be rightfully exercised within its limits, they had, therefore an unquestionable right to grant it to whom they pleased, and under

what restrictions or limitations they thought proper. The people of Virginia, by their constitution or fundamental law, granted and delegated all their supreme civil power to a legislature, an executive and a judiciary; the first to make; the second to execute; and the last to declare or expound, the laws of the commonwealth. This abolition of the old government, and this establishment of a new one, was the highest act of power that any people can exercise. From the moment the people of Virginia exercised this power, all dependence on, and connection with Great Britain absolutely and forever ceased; and no formal declaration of independence was necessary, although a decent respect for the opinions of mankind required a declaration of the causes which impelled the separation; and was proper, to give notice of the event to the nations of Europe."

Going back to the tyranny of the English King and Parliament, Chase showed that from the Assembly of the Continental Congress, of which he was a member, until Maryland ratified the Articles of Confederation, March 1, 1781 ours was a revolutionary government possessing all powers necessary to its existence. A revolutionary is the most powerful government on earth. Virginia became a sovereign state before the Declaration of Independence. That declaration did not add to or detract from her power. Her bill of rights, which preceded the Declaration of Independence was the only restraint on her sovereignty, which subsisted until she gave up the war and peace powers, when she assented to the Articles of Confederation. Under the peace powers, as set forth in Article 9 of the Confederation, the Congress could do whatever was necessary to make peace, anything Virginia might say to the contrary. Otherwise war would be perpetual. And then Article 6

of the Federal Constitution ratified the Peace Treaty with Great Britain.

I quote him from page 236 of 3 Dallas:

> "If doubts could exist before the establishment of the present national government, they must be entirely removed by the 6th Article of the Constitution which provides: That all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; and the Judge in every state shall be bound thereby, and anything in the Constitution or laws of any state to the contrary notwithstanding."

He called on his practical experience as a lawyer that the Court would not abrogate the Treaty of Peace so long as the President, Washington, upheld it, no matter how much George III might violate it; that in the absence of a bill of rights whether under the Articles of Confederation or the Constitution the Congress could appropriate the property of the citizen was clear, but that it was not right was equally clear, and that the men charged with the administration of the government would identify the men whose property was taken for the public good was equally clear—and so they would reverse the judgment in Hilton's favor. He was now talking or writing *like* a statesman. But he would let the statesman whether on the executive or legislative side do the indemnifying.

He preserved our three divisions of government by not encroaching on the executive or legislative powers.

And so Hilton did not have to pay the administrator of Jones a second time. Thomas Jefferson afterwards protested that the commissioners under the Jay Treaty were allowing the British creditors too much money, but, as

President Jefferson signed the checks, they ran into millions.

One of the historical mistakes is that Patrick Henry opposed the establishment of the government of the United States. Not so, he only opposed making his clients pay a second time in coin their debts to the British creditors. If it is so necessary to secure that acknowledgment by the British King of our independence the government of the United States must make the second payment. By the Jay Treaty Washington provided that the government of the United States should make the second payment and Patrick Henry became an unqualified supporter of the Washington administration and the government of the United States.

Mr. Jefferson, as this Court knows, was in 1789-1798 opposing the ratification or obeying the Treaty of Peace with Great Britain. The Resolutions of '98 which he drew were directed at Samuel Chase and his opinion in the Hilton case. They did not impair Justice Chase facility to instruct a jury—but they led many of Jefferson's followers to Appomattox, while their opponents considered *the Constitution as originally drawn a bill of rights.*

The Federalist No. LXXIV, page 476.

On page 483 of the Federalist are these words:

> "We ought to remember that the citizen who inhabits the country at or near the seat of government will in all questions that affect the general liberty and property have the same interest with those who are at a distance; and that they will stand ready to sound the alarm when necessary and to point out the actors in any pernicious project."

The action of the Judiciary Committee of the House and that of the Chairman of the Advisory Committee of the Court itself as disclosed by the complaint and Exhibit B make it proper now for the chief integer "the citizen" as was contemplated by the old system and under his enlarged powers to come here.

CITIZENSHIP

Citizenship in this United States of America is something different than under that of any other form or theory of government heretofore developed by man.

So far as the record discloses, George Washington, at New York, on his way to take command of the Revolutionary Army then at Boston, June 25, 1775, was the first man to proclaim himself a citizen of the existing revolutionary government as distinguished from a former subject. Aristotle said, five hundred years before Christ, "a man was not a man until he was a citizen." Washington as a citizen took on not only all the rights and privileges and immunities of a citizen of Rome and Athens—but more power. Even as a subject, he had claimed the right to use force against his King. That was the highest exercise of due process. Washington's soldiers accepted his views of government.

It was not the government of the Continental Congress that the soldiers wanted perpetuated.

If Colonel Louis Nicola is to be believed he knew what he was saying when he wrote Washington from Newberg, May 22, 1782, that the Army believed the Congress was incompetent, that a Republican form of government could not function and that he (Washington) must accept the crown.

Washington did not consult Thomas Jefferson or any other member of that Congress but answered the old colonel, who had long been recognized as a spokesman for the Army that no man could be king and no man or interest could be judge in his or its interest, *Colder v. Buel*, 3 Dallas. Washington's soldiers agreed with him that there should be a separation of the legislative, executive and judicial powers of the new government.

The Society of the Cincinnati is the oldest patriotic society in this country. It is the model for all the soldier organizations not excepting those of the old Confederates, who clung to the 11th amendment until Appomattox. It was organized at Newburg on the Hudson May 10, 1783, by the officers of the Revolutionary Army "*to preserve the principles of the American Revolution.*"

The soldiers never favored the government of the Continental Congress and but for Washington would have turned that body into the street.

Having made good his claim to the title "Citizen" in the new order of government, Washington thought the twenty-one lawyers (the most eminent of the time) who sat in the drafting of the Constitution for the government to be, would make a definition of or a proper acknowledgment of the power, to say nothing of the rights, privileges and immunities of the citizen, the new "sovereign" in government, as George the III in the treaty of peace and this Court in *Chisholm v. Georgia*, 3 Dallas 438 had denominated him.

Difficult as was the task that was imposed on the best lawyers of the time is no reason why their successors and the members of this Court should refuse to hear from the boys in the trenches when these lawyers and this Court

undertake to inaugurate a new system of government as this Court says in *Sibbath v. Wilson*, 312 U. S. 1. As an admonition to this Court its failure to induce the fighting men of the late '50s to accept its definition of "citizenship" ought to be most persuasive. The Dred Scott case correctly decided, emphasizes the proposition that this court should law off the legislative power.

Never was there any criticism of Chief Justice Tanney by Wendall Phillips, the Abolitionist lawyer, or praise of Justice Curtis. After fighting four years, they took the advice of the Chief Justice and amended. Having given that advice, the Chief Justice and his associates should have stopped.

The treaty of peace with Great Britain did not become final until September 3, 1783. Notwithstanding the resolution of the soldiers that treaty of peace departed in a measure from the principles of the American Revolution. One of its plaints was "he has made our judges dependent on his will for their salaries and the term of their offices. Another was he refused his assent to laws for the establishment of judicial powers.

This court in its early history, in *Vanderspont v. Maryland*, 2 Dallas 438; *Chisholm v. Georgia*, 2 Dallas 439; *Brailsford v. Georgia*, 3 Dallas 1; *Ware v. Hilton*, 3 Dallas 169; *Caledar v. Buel*, 3 Dallas 386, went behind Washington and his soldiers' conception of government. The eleventh amendment was a mistake which the Union Soldier recognized at Appomattox although the lawyers do not yet seem to see it. The military order of the Loyal Legion of the United States was organized the day Mr. Lincoln was shot on the model of the Cincinnati as hereinbefore shown.* It was able to go farther in the support of the existing

government—the proposed amendment—than did the Cincinnati and had more consideration for its opponents than the lawyers and statesmen who undertook to draft the changes in the fundamental law designed to get back to the principles—the system of—Washington and the early members of this court.

While the Act of June 19, 1934, is silent as to submitting or referring the rules to the judges of the District Court and the individual lawyer, I, for one, assumed that construction of the Act of the Advisory Committee of the Supreme Court was correct and felt, and still feel, that, if the Act of June 19, 1934, does not authorize the Congress and the Court to exclude the citizen from access to the courts, and to the body politic, the first, second and third clauses of the 14th Amendment authorize the citizen to press the button which will start or wreck the most powerful government machine ever created.

Hague Industrial Union, 307 U. S. 496.

And that case shows that the eminent counsel, who intervened as friends of the Court, had not entirely mastered our American constitutional system. Certainly Thomas and Browder might profit by a reference to how Samuel Chase showed how the American people had organized their government.

According to *Ex Parte Garland*, 4 Wallace 333, even the dissenting opinion (384) recognizes the obligation of the Court to the individual lawyer. A lawyer does not have to be an advocate like Erskine or Phillips to aid his government or to upset it, and this I rest on a word of warning of Erskine's after he ceased to be Lord Chancellor

*Ante

of Great Britain, in protesting against a certain ill-advised measure that did not pass:

> "We all know, my Lords, that in political life there are wheels within wheels, as many, almost, as in a silk mill; that the smallest, and apparently the most insignificant, are sometimes, from their situations, the most operative; and that some of them, besides, are sunk so deep in the dirt that it is very difficult to find their places, *though one can very easily find their tracks and their effects.*"

There are 3,500 lawyers in Indiana and less than 1,650 members of the Indiana Bar Association. There are 200,000 lawyers in the United States but only 30,000 are members of the American Bar Association.

But, if the Congress and the Court exceed their power in calling on me for my views as to the validity of their acts, the first, second and third clauses of the first section of the Fourteenth Amendment authorizes me to so act. This section of the Fourteenth Amendment was submitted to the people and ratified by them for the very purpose of depriving Congress and the Supreme Court and the chief executive or the commander-in-chief of the Army and Navy of the power to deprive a citizen of the United States of the power the First Amendment and the first clause of the Fourteenth Amendment conferred.

> Congressional Globe, 1866, Part 4, page 2893.
>
> Concurring opinion of Justice Stone in *Hague v. Industrial Union*, 307 U. S. 496-518.

The complaint then referred the Court to Justice Story's advice in *Martin v. Hunter, Lessee*, 1 Wheaton 304, to confer on the inferior courts all the jurisdiction the Constitu-

tion carries. It renewed to the Judiciary Committee, to whom the Court and the Congress had referred the rules, the challenge to the constitutionality of the Act of June 19, 1934, which brought the doctrine of the apportionment of the legislative and judicial power between the Congress and the Supreme Court in the report of the Judiciary Committee of the House of June 13, 1938.

It is a subject that should be considered by the Bench and the Bar. But the Bench and Bar (and especially the Indiana State Bar Association) will not allow your petitioner to discuss it, although he asks in his complaint a mandatory injunction for a hearing by the Indiana Bar Association.

The present United States District Attorney for the District of Indiana as the president of the Indianapolis Bar Association joins that Association and the Indiana Bar Association in denying your petitioner the right to be heard on this question of the judicial power.

The doubt of the power of the Court to formulate rules as to substantive law as set forth in *Sibbach v. Wilson Co.*, 312 U. S. 1, accentuates the inability of the Executive Branch of the Government to do what the Court declared in *Gibbon v. Ogden*, 9 Wheaton 1, was the function of the Government of the United States to do, *viz.*: to control the commerce of the United States and every agency thereof.

The rules or laws to empower the courts and the executive to do this must come from the people through the Congress. The courts and the executive cannot amend the Smith-Connely Act.

In the Prigg case, *Prigg v. Pennsylvania*, 16 Peters 530, 10 Law Ed. 1060, and in the Dred Scott case, *Dred Scott*

v. Stanford, 19 Howard 393, although this Court proceeded on the theory "that it would make such an exposition of the Constitution and laws as would put at rest the conflict of opinion on the question which involved as delicate and important considerations as had ever come before it," really made the war inevitable.

Correctly decided, under our compromised constitutional system the people refused to take the Court's order and correct those harsh rules that they had written in their Constitution. It was a mistake for the Court to take up at that time a political and economical question.

But there can be no question about the power and duty of this Court now to settle a question of its power under an act of Congress—that of June 19, 1934—which involves the functions of the Congress and the executive as well as the very existence of the Court itself.

And be it further remembered that there is more doubt and distrust in the Judiciary and among the members of the bar and among the people today about the functions of this Court than there was in the days of the Prigg and Dred Scott cases. But there is this difference—that the people will be most receptive of what the Court may conclude—than they were in those days.

Besides, after fighting for four years, the statesmen and the people came to Chief Justice Tanny's conclusion and amended by making our "citizen" the keystone of the arch.

The most important of the bills of right is the division of the powers of our government into the three departments. Indeed, it was argued that, with this divsion of powers, no other bill of right was necessary. As originally drawn, the Constitution was a bill of right. Without the

Bills-of-Right or the first ten Amendments, Samuel Chase held in *Ware v. Hilton*, 3 Dallas 169, the citizen would be protected in his liberty and property. Of all the changes Washington wrought in government one of the most important was to get an impartial judge. Perhaps a better way of putting it is—that, if the system which Samuel Chase describes in *Ware v. Hilton* is preserved, the citizen will take care of himself.

Let not this Court then acquiesce in the delegation of any of the judicial power as conferred in the Third Article to any but a judicial body.

Let this Court take no part as a subordinate in the assumption of any legislative power.

Important as Grant and Sherman's contributions may have been to the preservation of the civilization of the race, their efforts were far surpassed by the acts and exposition David Davis and his four associates made in the Milligan case. They demonstrated that the government of Samuel Chase, so accurately described by Justice Davis, could function whether in war or peace.

One of the differences between Washington and Jefferson was that Washington wanted an independent judiciary. We in no wise deprecate the work of Thomas Jefferson, but no man who knows the history of James Otis and George Washington can say that Mr. Jefferson had any hand in making our judicial system.

The passage of the Smith-Connely Act, which, in turn, is insufficient, is conclusive that neither the judicial nor executive power, or both combined, are sufficient to control the commerce, and every agency thereof, of the United States. *Gibbon v. Ogden*, 8 Wheaton 1. The Smith-Connely Act is insufficient and must be amended.